IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Workforce Safety & Insurance and Bobcat Company, Appellants, -vs- Cynthia Auck, Appellee.	)	Supreme Court No: 20090223 District Court No: 09-C-00302 FILED IN THE OFFICE OF THE CLERK OF SUPREME COURT SEP 11 2009 STATE OF NORTH DAKOTA

BRIEF OF APPELLANT WORKFORCE SAFETY & INSURANCE

Appeal from Order dated June 2, 2009, and Judgment entered June 30, 2009, the District Court of Burleigh County, South Central Judicial District, the Honorable Donald L. Jorgensen, Judge

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II. The ALJ's Findings of Fact and Conclusions of Law are not supported by the preponderance of the evidence in that:

a. The ALJ's findings of fact that Auck suffered stress greater than the highest level of stress normally experienced or anticipated in his line of work is not supported by the preponderance of the evidence.

b. The ALJ's finding of fact that long-term chronic pain can cause a heart attack is not supported by the preponderance of the evidence.

c. The ALJ's finding of fact that Auck's stress was caused by having to work with long term chronic pain is not supported by the preponderance of the evidence.

III. The ALJ's conclusions of law are not sustained by the findings of fact.

IV. The ALJ abused his discretion when weighing the credibility of the conflicting medical opinions.

STATEMENT OF THE CASE

This is an appeal by Workforce Safety & Insurance (hereafter "WSI") from a June 25, 2009 judgment (App. 6-7) which was entered in Burleigh County District Court on June 30, 2009. (App. 3-5). The judgment is based on District Judge Donald L. Jorgensen's June 2, 2009 order (App. 8-13) affirming the January 16, 2009 Final Order of Administrative Law Judge Al Wahl (hereafter "ALJ") (App. 81-126; App. 127-128) (hereafter "Final Order".) This order reversed WSI's May 25, 2007 denial of death benefits (App. 15-21) to Appellee, Cynthia Auck (hereafter "Appellee") for the November 26, 2006 death of her husband, Richard Auck (hereafter "Auck").

WSI appeals from the Judgment affirming the ALJ's Final Order in that the preponderance of the evidence does not establish that Auck's heart attack was caused by his employment with Bobcat Company/Ingersoll Rand ("Bobcat") with reasonable medical certainty, or that to a reasonable degree of medical certainty his employment caused any unusual stress which was at least fifty percent of the cause of his heart attack as compared with all other contributing causes combined as required by N.D.C.C. § 65-01-02(10)(a)(3). WSI further contends the ALJ's Final Order is not in accordance with the law, and that it should be reversed, reinstating WSI's original denial of death benefits.

STATEMENT OF FACTS

On November 26, 2006, Auck, an assembler at Bobcat, had clocked-in and was just donning his boots when he experienced severe leg pain for which an ambulance was called. (App. 23; App. 50; App. 141, 1-22-08 TR., J. Boehm, RA 65, p. 83, ll. 1-22). Bobcat's nurse was concerned because Decedent was complaining of leg pain. (App. 168-169, 171-171b, 3-11-08 TR., W. McNichols, RA 66, p. 190, l. 25-p. 191, l. 3; 200, ll. 12-14; p. 202, l. 25- p. 203, l. 25.) She recognized from her prior experience as a cardiac nurse that this could signify a blood clot which could pose a life threatening condition such as an immediate myocardial infarction if the clot traveled to the heart. (Id.) Unfortunately, once in the ambulance, Auck suffered a fatal heart attack. (App. 33-37, RA p.W00439-443; App. 43-58, RA p. W00638-653). An attending physician, Dr. Lloyd Blake (hereafter "Dr. Blake"), noted "the cause of death is cardiac arrest of unknown cause, suspect massive pulmonary embolism verses myocardial infarction." (App. 43, RA p. W00638). The second attending physician, Dr. Robert Bathhurst, noted "[p]robable direct cause of death, arteriosclerotic cardiovascular disease." (App. 45, RA p. W00640). No autopsy was performed, and without an autopsy, even Appellee's own expert, a family physician, Dr. Jeffrey Smith, (hereafter "Dr. Smith") agreed he could not confirm the cause of Auck's cardiac arrest. (App. 174, 5-19-08 TR., Dr. Smith, RA 68, p. 101, 1.2-8). (Emphasis added.)

Decedent began work in the cab mezzanine area sometime in 2003. (App. 159, 3-11-08 TR., C. Roemmich, RA 66, p. 71, ll. 16-21.) Contrary to the assumption of Dr. Smith and the testimony of Appellee, the cab mezzanine assembly work was not heavy

work, but rather consisted of light duty work in an air conditioned environment. (App. 142, 143, 144, 1-22-08 TR., J. Boehm, RA 65, p. 104, ll. 10-17; p. 110, ll. 11-14; p. 132, ll. 12-13.)

Auck was not required to perform any duties which other employees were not required to perform. (App. 145, 1-22-08 TR., C. Auck, RA 65, p. 201, ll. 5-8; App. 148, 1-22-08 TR., D. Krick, RA 65, p. 229, ll. 1-8; App. 148a, 1-22-08 TR., D. Hellman, p. 247, l. 11-24; App. 160, 3-11-08 TR., C. Roemmich, RA 66, p. 99, ll. 12-23.) Nor was his job in jeopardy because of any work restrictions, (App. 161, 3-11-08 TR., C. Roemmich, RA 66, p. 100, ll. 5-14), failure to meet the build schedules or unavailability of parts. (App. 163-166, 3-11-08 TR., T. Goodmanson, RA 66, p. 145, l. 21 – p. 146, l. 7; p. 148, l. 3- p. 149, l. 12 .) Bobcat provided accommodations to employees with work restrictions, including Auck. (App. 149-150 and 151-152, 1-22-08 TR., D. Hellman, RA 65, p. 255, l. 19 – p. 256, l. 13; p. 259, l. 8 – p. 260, l. 13; App. 147, 1-22-08 TR., D. Krick, RA 65, p. 218, ll. 7-23; App. 154-158, 160, 3-11-08 TR., C. Roemmich, RA 66, p. 32, ll. 18-22; p. 33, l. 23 – p. 34, l. 12; p. 36, ll. 16-20; p. 52, ll. 3-14; p. 99, ll. 5-11.)

Dr. Smith, a family practitioner, had treated Auck since approximately 1994. (App. 85, Finding of Fact (hereafter "Finding") # 10, RA p. W02083; App. 130, 1-22-08 TR. Dr. Smith, RA 65, p. 12, ll. 2-3; p. 13, ll. 2-4.) However, Dr. Smith did not treat Auck on the date of his death, and had not treated him for nearly two months. (App. 26a-26b, RA 21, p. W00250-251.) In May, 2001, a few years prior to being transferred to light duty, Auck was taken to the hospital from work with chest pains for which no Workers Compensation claim was made. (App. 162, 3-11-08 TR., C. Roemmich, RA 66, p. 126, l. 4-24; App. 170, 3-11-08 Tr., W. McNichols, p. 193, ll. 14-17; App. 38, RA 26,

p. W00449; App. 61.) Auck remained off work for that cardiac incident from May 14, 2001 to June 4, 2001 and records signed by Dr. Smith document this was not work-related, but was due to coronary artery disease. (App. 64-66, RA 52, p. W00594-595; p. W00597.) On October 17, 2005, Dr. Smith assessed Auck as having "[c]hronic pain with multiple orthopedic problems, depression, and high risk for cardiac disease." (App. 85, Findings of Fact (hereafter Findings) # 12, RA 62, p. W02084; App. 25b-25c, RA21, p. W00230-231). (Emphasis added.) In a preoperative report, Dr. Smith himself documented that Auck suffered from multiple coronary risk factors, one of which included chronic pain, not from work, but rather from "diffuse degenerative disease." (App. 25, RA 21, p. W000216.) (Emphasis added.) This record contained no reference to depression or work stress as coronary risk factors. Id. Despite these prior treatments, and despite the fact that Auck had many objective physical risk factors which predisposed him to cardiac arrest, including known coronary artery disease, high cholesterol, high blood pressure, obesity, lack of physical exercise, and family history of coronary disease, in his testimony, Dr. Smith dismissed all of these objective risk factors as irrelevant in causing Auck's fatal heart attack. (App. 139-139a, 1-22-08 TR. Dr. Smith, RA 65, p. 62, l. 10-p. 63, l. 7; App. 91, Finding # 20, RA 62, p. W02089.) (Emphasis added.)

Instead, Dr. Smith opined that Auck's work stress was at least fifty percent the cause of Auck's death compared to all other risk factors. (App. 135, 1-22-08 TR., Dr. Smith, RA 65, p. 28, ll. 1-6). However, as discussed above, coworkers did not identify any work stress which Auck experienced that was any greater than that experienced by any other employee in his position. Dr. Smith further opined, had Auck not been

working at Bobcat, he would not have had a heart attack at that point in his life. (App. 135, 1-22-08 TR., Dr. Smith, RA 65, p. 28, ll. 9-14; App. 91, RA 62, Finding # 20, p. W02089). Dr. Smith rendered his opinions having no knowledge of Auck's medical history prior to Auck's beginning employment with Bobcat's predecessor, (App. 137, 1-22-08 TR., Dr. Smith, RA 65, p. 39, l. 8-13.), without ever being at Bobcat to observe Auck's working conditions, and he was unaware that Auck had worked light duty jobs, not heavy duty, for several years prior to his death. (App. 138-139, 1-22-08 TR., Dr. Smith, RA 65, p. 61, l. 21 – p. 62, l. 12).

Dr. Smith's opinions changed over time. Initially, on January 9, 2007, he opined Auck's death was not directly caused by work, but was due to a delay in the emergency personnel gaining access to treat Auck, and their intubating him incorrectly. (App. 27-30, RA 21, pp. W00253-W00256; App. 136, 1-22-08 TR., Dr. Smith, RA 65, p. 34, ll. 14-22). Importantly, Dr. Smith did not even mention stress in this initial opinion.

Subsequently, with Dr. Smith's support, Claimant's theory changed to assert that Auck's subjective expression of stress, cumulative over time, caused Decedent's heart attack. Yet, Dr. Smith testified this stress admittedly was not any different on the date of Auck's death from any other day in the course of his work, (App. 140, 1-22-08 TR., Dr. Smith, RA 65, p. 65, ll. 16-22.)

In the ALJ's Conclusions of Law (hereafter Conclusions), the ALJ ultimately concluded "the greater weight of the evidence of record, considered in its entirety and in context, is persuasive that the likely cause of Auck's death on November 29, 2006, was a heart attack caused by stress resulting from his work with long-term chronic pain as an

assembler employed by Bobcat Company." (App. 120, Conclusion # 13, RA 62, p. W02118).

Neither Appellee nor Dr. Smith distinguished between pain that Auck suffered from work related injuries as opposed to non-work related injuries nor did Dr. Smith explain how much pain or stress was attributed to either, although he seemed to attribute the primary area of pain to Auck's wrists. In fact, Auck experienced substantial non-work injuries, including many to the wrists. Auck suffered from significant wrist injury prior to working at Bobcat. (App. 146, 1-22-08 TR., C. Auck, RA 65, p. 207, ll. 5-10; App. 167, 3-11-08 TR., W. McNichols, RA 66, p. 183, ll. 1-8.) He fell off a parked car in 1973 and "broke his arm". (App. 70, RA 52, p. 734.) After nine months, that fracture had not healed and required surgery, only to be hurt again when helping a friend move. (App. 71, RA 52, p. 740.) A right wrist injury did not heal, and required a bone graft and surgery. (Id.; App. 73-76, RA 52, p. 872-875.) In a snowmobile accident he reinjured the previously unhealed right wrist. (App. 72, RA 52, p. 869.) In April, 1980 Auck suffered right wrist pain from driving a tractor while trying to help some farmers. (App. 77, RA 52, p. 1016.) He suffered from gout, and degenerative arthritis "in a lot of places", both of which Dr. Smith agreed were very painful conditions, and from a congenital foot deformity. (App. 133-134, 1-22-08 TR., Dr. Smith, RA 65, p. 18, ll. 16-25; p. 19, ll. 5-11; App. 167, 3-11-08 TR., W. McNichols, RA 66, p. 183, l. 9-15; App. 32, RA 22, p. W00311.) In 1989, he injured his left wrist at home while trying to separate fighting dogs. (App.79, RA 52, p. 1401.) A June, 1993 motorcycle accident resulted in facial injuries, injuries to his right foot, and required time off work. (App. 63, 67-69, RA 52, p. 83; p. 613; p. 616-617.) Auck reported to his employer that he

experienced extreme stress at home. (App. 78, RA 52, p. 1396.) Dr. Smith himself also documented that Auck experienced stress at home, even within a few months of his death. (App. 26, RA 21, p. 248). At this time he also reported his depression had improved with testosterone treatments. (Id.) He was stressed over his son's physical illness. (App. 25a, RA 21, p. W00228.) Appellee offered no evidence that differentiated between the stress and chronic pain from these non-work related conditions and that stress and chronic pain alleged to arise from work-related injuries.

In 1972 before he began working for Bobcat, Auck filed his first claim with the North Dakota Workers Compensation Bureau for an injury to his lower arm. (App. 60.) Although thirty-six claims were filed on his behalf, including this death claim, significantly, not one single claim was ever filed for depression or work-related stress. (App. 60-61.). Of all Auck's claims, all but four are presumed closed. (Id.).

The ALJ did not distinguish between any of the non-work and work injuries or conditions that caused Auck stress and pain. The ALJ also did not make a Finding that stress was caused by anything but pain despite the employment and medical records that document Auck suffered stress at home and his depression was improved by testosterone treatments.

Dr. Smith opined that there is a relationship between stress and heart problems based on materials he had read but which materials were not admitted into evidence. (App. 92-93, Finding # 21, RA 62, p. W02090-91; App. 173, 5-19-08 TR., Dr. Smith, RA 68, p. [99] (*sic*) (corrected), ll. 20-24; App. 175-176, 5-19-08 TR., Dr. Smith, RA 68, p. 116, l. 21-p. 117, l.9). However, on cross-examination Dr. Smith agreed that those very articles indicated "[t]here is only limited empirical evidence bearing on this

hypothesis" and "at this point the evidence remain inconclusive." (App. 93, Findings 22 & 23, p. W02091; App. 176-177, 5-19-08 TR., Dr. Smith, RA 68, p. 117, l. 18-118, l. 22.) Despite having relied upon these references as supportive us his opinions, Dr. Smith testified he could not speak to the application of those statements without first reading the entire paragraph. (App. 93, RA 62, Finding # 22, p. W02091; App. 177, 5-19-08 TR., Dr. Smith, RA 68, p. 118, ll. 14-24). Even after reading the paragraph, he conceded that researchers have reached inconsistent conclusions. (App. 177-179, 5-19-08 TR., Dr. Smith, RA 68, p. 118, l. 22-p. 120, l. 2.) Nonetheless, Dr. Smith still opined that Auck's alleged "work caused stress" was at least fifty percent responsible for Auck's heart attack, and ultimately his death. (App. 135, 1-22-08 TR., Dr. Smith, RA 65, p. 28, ll. 1-6.) The ALJ accepted Dr. Smith's opinion that stress triggered Auck's heart attack. (App. 91-92, RA 62, Finding # 20, W02089). The ALJ stated "[s]pecifically, considering the evidence of record, the fact that studies have not been completed showing that the effects of cumulative stress can be proven by repeat studies and that the affects of cumulative stress have been not scientifically established by such controlled studies ... is not a basis for disregarding or dismissing Dr. Smith's ... opinions..." (App. 118, RA 62, Conclusion # 11, p. W02116).

Dr. David Berman (hereafter Dr. Berman), a cardiology specialist, was retained by WSI to provide an independent records review. (App. 94-95, RA 62, Finding # 26, p. W02092-93). Contrary to Dr. Smith, Dr. Berman opined that Auck's risk factors of hypertension, high cholesterol, obesity, smoking, and a history of coronary disease were relevant, and in fact were the cause of Auck's heart attack. (App. 94-95, Finding # 27, p. W02092-93; App. 144a-144e, 1-22-08 TR., Dr. Berman, RA 65, p. 145, ll. 3-14; 148, l.

23- p. 149, l. 22; p. 171, l. 18-p. 172, l. 4.) Responding to Dr. Smith's opinion of the causal relationship between cardiac arrest and stress, Dr. Berman testified that this was a controversial subject in the medical community. (App. 94-95, Finding # 27, p. W02094-95; App. 144e, 1-22-08 TR., Dr. Berman, RA 65, p. 172, ll. 2-4). In other words, consistent with the inconclusive references relied upon by Dr. Smith, Dr. Berman could not speak to the exact contribution of long-term pain and stress to causation of a heart attack.

Dr. Joel Blanchard, a specialist in family medicine (as is Dr. Smith), testified for Bobcat. (App. 99, RA 62, Finding # 35, p. W02097). Contrary to Dr. Smith, Dr. Blanchard actually had viewed the Bobcat work areas, including the cab mezzanine area in which Auck worked the years just prior to his death. (Id.) He testified that the many "hard facts" or risk factors with which Auck had been diagnosed were significant to causation in Auck's death, and like Dr. Berman, did not find a correlation between stress and the cardiac arrest. (App. 172b-172c, 5-19-08 TR., Dr. Blanchard, RA 68, p. 48, l. 3-p. 49, l. 20.) Like Dr. Berman, Dr. Blanchard did not find a correlation between stress and cardiac arrest, particularly in light of all the other risk factors with which Auck was diagnosed. (App. 99, RA 62, Finding 38, p. W02097-98.) In the course of his work as a physician, he had not viewed literature supporting that premise. (App. 172d, 5-19-08 TR., Dr. Blanchard, RA 68, p. 58, ll. 8-25.) Ultimately, he concurred with one of the treating physicians, Dr. Blake's, assessments that the cause of Auck's cardiac arrest could have been a pulmonary embolus. (App. 102-103, RA 62, Finding # 43, p. W02100-01; App. 172a, 5-19-08 TR., Dr. Blanchard, RA 68, p. 40, ll. 22-24).

The ALJ's Findings are irreconcilable and not supported by the evidence. He made several Findings about Auck's alleged stress, its origins, and how it affected him. (App. 83-113, RA 62). He concluded that, pursuant to N.D.C.C. § [6]5-01-02(10)(3) [sic] (corrected), for a heart attack caused by mental stimulus to be a compensable injury, the mental stimulus which is unusual stress must both arise out of the course and scope of employment and must be caused by "unusual stress", as defined by the legislature as stress greater than the highest level of stress normally experienced or anticipated in the course of work as a Bobcat assembler. (App. 120, RA 62, Conclusion # 14, p. W02118). He specifically found that "there is no medical evidence of record showing that any stress [Auck] experienced [was] as a result of Bobcat Company's quality control practices." (App. 108-110, RA 62, Finding # 54, p. W02106-08). The ALJ also found "there is no evidence that any stress he experienced related to production quotas was more than what may be normally experienced or anticipated by Bobcat production workers..." (Id.) Regarding the Bobcat union strike a few weeks prior to Auck's death, the ALJ found "there is no evidence showing that the nature and extent of the stress Auck experienced or anticipated relative to the strike was more than what may be normally experienced or anticipated..." (App. 110, Finding #54, p. W02108). Yet, the ALJ still found Auck's heart attack to be a "compensable injury" under the statute, because Auck's heart attack was triggered by "stress resulting from his work with long-term chronic pain as an assembler." (App. 120, RA 62, Conclusion # 13, p. W02118).

The ALJ's conclusions were based largely on Dr. Smith's testimony. Dr. Smith "felt" Auck experienced "extraordinary" stress. (App. 135, 1-22-08 TR., Dr. Smith, p. 28, ll. 7-8; App. 88, Finding # 15, RA 62, p. W02086). He asserted that simply being at

work caused Auck stress every day, and it did not even matter if Auck was "doing something or not." (App. 139a, 1-22-08 TR., Dr. Smith, RA 65, p. 63, ll. 16-19.) Dr. Smith opined that stress triggered Auck's heart attack. (App. 91-92, RA 62, Finding # 20, p. W02089-90; App. 135, 1-22-08 TR., Dr. Smith, RA65, p. 28, ll. 1-8). The ALJ concluded Dr. Smith characterization of Auck's stress as "extraordinary" was certainly "unusual stress" under the statute. (App. 120, RA 62, Conclusion # 14, p. W02118). Dr. Smith testified that Auck "would walk into work, and the minute he would walk in the door he would start to feel anxious and stressed from work." (App. 91-92, RA 62, Finding # 20, p. W02089-90; App. 139a, 1-22-08 TR., Dr. Smith, RA 65, p. 63, ll. 5-7). Importantly, Dr. Smith did not reach this conclusion until after he was informed of the statutory requirements to seek compensation. (App.120-121, RA 62, Conclusion # 15 p. W02118-19). Nonetheless, the ALJ found Dr. Smith's testimony credible.

The ALJ made several credibility findings between Dr. Smith, Dr. Berman, and Dr. Blanchard. The ALJ acknowledged that Dr. Smith's opinions "evolved" over the course of the proceedings which raised a "suspicion of rather more advocacy than a standard of objective medical evidence would allow." (App. 115, RA 62, Conclusion # 6, p. W02113). Before even beginning this proceeding, Dr. Smith already had "a very low opinion of the Bobcat Company" that was based on a false understanding Bobcat failed to accommodate Auck's work restrictions. (Id.) He noted Dr. Smith's lack of knowledge of the basic facts underlying Auck's work duties was troublesome. (App. 119, RA 62, Conclusion # 11, p. W02117. Nonetheless, he found Dr. Smith more credible than either Dr. Berman or Dr. Blanchard.

The ALJ was critical of Dr. Berman's and Dr. Blanchard's dismissal of the effects of working with long term chronic pain. He discounted Dr. Berman's opinions that this was "controversial." (App. 118, RA 62, Conclusion # 11, p. W02116). He also discounted Dr. Blanchard's testimony that he had not found this effect referenced in the medical literature which he had reviewed. (Id.) Whereas he accepted Dr. Smith's "feeling" that Auck experienced "extraordinary" stress as discussed above, the ALJ criticized Dr. Blanchard for his "gut feeling" that Auck suffered a pulmonary embolism. (App. 119-120, RA 62 Conclusion # 12, p. W02117-18.) Dr. Blanchard's "gut feeling" appears to have become the basis for finding Dr. Blanchard's opinions less credible than Dr. Smith's opinions. (App. 120-122, RA 62, Conclusion # 15, p. W02118-20.)

Standard of Review

In an appeal from an administrative agency decision, the standard of review is statutorily defined in N.D.C.C. § 28-32-46 which provides, in pertinent part, as follows:

> ...[T]he court must affirm the order of the agency unless it finds that any of the following are present:
>
> 1. The order is not in accordance with the law.
>
> 2. The order is in violation of the constitutional rights of the appellant.
>
> 3. The provisions of this chapter have not been complied with in the proceedings before the agency.
>
> 4. The rules or procedure of the agency have not afforded the appellant a fair hearing.
>
> 5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
>
> 6. The conclusions of law and order of the agency are not supported by its findings of fact.

7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.

8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

If the order of the agency is not affirmed by the court, it must be modified or reversed, and the case shall be remanded to the agency for disposition in accordance with the order of the court.

N.D.C.C. § 28-32-46. A reviewing court exercises restraint in deciding whether an agency's findings of fact are supported by a preponderance of the evidence and does not make independent findings or substitute its judgment for that of the agency. Elshaug v. Workforce Safety and Ins., 2003 ND 177, ¶ 12, 671 N.W.2d 784. The reviewing court decides only whether a reasoning mind reasonably could have decided the agency's findings were proved by the weight of the evidence from the entire record. Id. Questions of law, including the interpretation of a statute, are fully reviewable on appeal from an administrative decision. Id.

The order of the ALJ must be reversed under N.D.C.C. § 28-32-46 because it is not in accordance with the law, particularly in the application of the plain language of N.D.C.C. § 65-01-02(10), the Findings are not supported by a preponderance of the evidence, the Conclusions are not supported by the Findings, and the Findings do not sufficiently address the evidence presented. Thus, a reasoning mind could not reasonably find that the ALJ's Findings were proved by the weight of the evidence, considering the entire record.

LAW AND ARGUMENT

I. THE ALJ'S ORDER REVERSING WSI'S DENIAL OF WORKERS COMPENSATION, BASED ON THE CONCLUSION OF LAW THAT AUCK'S HEART ATTACK WAS CAUSED BY PAIN INDUCED STRESS, IS NOT IN ACCORD WITH THE LAW.

In Sandlie v. North Dakota Workmen's Compensation Bureau, 70 ND 449, 295 N.W. 497 (1940), the court stated:

> [T]he purpose of the Compensation Fund... is ... to afford sure and certain relief to an employee who suffers an injury arising in the course of his employment, the term "injury" including accident and "any disease proximately caused by the employment." . . . It is not a health or life insurance fund, nor an accident insurance fund except to a limited degree. . . . It is not a general social insurance law justifying awards in cases of ordinary disease not arising in the course of the employment."

Id. at 499. In 1995, the Workers Compensation Act was amended to provide as follows:

> This title may not be construed liberally on behalf of any party to the claim or action.

N.D.C.C. § 65-01-01. (Emphasis added.) Regardless whether the statute is construed liberally, a claimant bears the burden of proof to establish that she is entitled to participate in the Workers Compensation Fund. Sprunk v. North Dakota Workers Compensation Bureau, 1998 ND 93, ¶ 5, 576 N.W.2d 861. Even if a liberal construction was applied, a court does not ignore the clear language of the statute under the guise of liberal construction. Saari v. North Dakota Workers Compensation Bureau, 1999 ND 144, ¶ 16, 598 N.W.2d 174.

A core principle of the Workers Compensation Act is that "compensable injuries" must be traceable to work-related injuries, and not to non-work-related injuries which have no causal connection to the work-related injury. Holtz v. North Dakota Workers Compensation Bureau, 479 N.W.2nd 469, 471 (N.D. 1991) (affirming denial of

rehabilitation benefits for hairdresser who sustained injuries in a slip and fall and a car accident, both subsequent to her work injury, which subsequent injuries caused physical limitation beyond those arising from the work-related injury).

A "compensable injury" is defined as an accident arising out of and in the course of hazardous employment, which must be established by medical evidence supported by objective medical findings. N.D.C.C. § 65-01-02 (10). A compensable injury includes, in pertinent part:

> Injuries due to heart attack or other heart-related disease, stroke, and physical injury caused by mental stimulus, but only when caused by the employee's employment with reasonable medical certainty, and only when it is determined with reasonable medical certainty that unusual stress is at least fifty percent of the cause of the injury or disease as compared with all other contributing causes combined. ***Unusual stress means stress greater than the highest level of stress normally experienced or anticipated in that position or line of work.***

N.D.C.C. § 65-01-02 (10)(a)(3). (Emphasis added.) Pain is generally considered a symptom of an existing condition, but by itself is not sufficient evidence of an injury or substantial aggravating or accelerating factor of a preexisting injury. See Bergum v. North Dakota Workforce Safety and Insurance, 2009 ND 52, 764 N.W.2d 178 (2009). Grouping all of Auck's injuries together, the ALJ found Auck's heart attack was "caused by stress resulting from his work with long-term chronic pain." (App. 120, RA 62, Finding # 13, p. W02118). However, pain itself is not a compensable injury. Auck's chronic pain itself is not a compensable injury.

Auck applied for Workers Compensation numerous times and he received compensation for several of those claims. The ALJ's Conclusions would create a precedent proceeding down a slippery slope which is contrary to public policy. As the ALJ's Conclusions stand, a claimant who suffers a heart attack would not need to

demonstrate an actual work place injury. The Court in Sandlie addressed this concern when it stated:

> While it appears to be the generally accepted rule that the acceleration of a pre-existing condition may be considered in certain cases to be the proximate cause of the injury sustained, we can not overlook the fact that every exertion has its effect upon the physical system; and if we carry the theory to extremes, then every movement in the course of employment would accelerate the natural condition of the physical body toward disease and decay and death. There must be more than this to justify a holding that the exertion or emotional disturbance was the proximate cause in this case.

Id. at 295 N.W. 497, 499. In the case before this court, under N.D.C.C. 65-01-02(10)(a)(3), Appellee must prove that "unusual" stress was at least fifty percent the cause of the heart attack and the "unusual" stress must bear more than a mere attenuated relationship to Auck's work to meet the basic underlying principle that to be compensable, the injury must arise out of and through the course of employment.

Case law clearly requires that to be compensable, injuries must be traceable to work. See Holtz, 479 N.W.2d 469, 471. That Auck suffered pain is insufficient to find a compensable injury. Here, there was a plethora of evidence that Auck suffered from many objective cardiac risk factors and incurred multiple non-work injuries. Yet, there was no evidence explaining to what extent work verses his non-work injuries caused his pain. Appellee bears the burden of proof and she did not prove pain was the result of work injuries. The ALJ made no Finding explaining the origins of Auck's pain, but found only that he worked with chronic pain. Pain alone is not a compensable injury, particularly when there is evidence of substantial non-work injuries and in view of the substantial objectively documented cardiac risk factors with which Auck had been diagnosed. Appellee simply did not prove, and the ALJ did not find that the pain arose out of and in the course of Auck's employment. He simply concluded that Auck's heart

attack was "caused by stress resulting from his work with long-term chronic pain". (App. 120, RA 62, p. W02118, ¶ 13.)

Under N.D.C.C. § 65-01-02(10)(a)(3), the test to determine whether a heart attack is a compensable work injury is twofold. First, Appellee must prove Auck suffered "unusual" stress caused by his employment with reasonable medical certainty. Secondly, she must prove that the "unusual" stress was at least fifty percent the cause of the heart attack and, as defined by statute, that "unusual" stress must be "stress greater than the highest level of stress normally experienced or anticipated in that position or line of work." N.D.C.C. § 65-01-02(10)(a)(3).

Auck's claim fails the test in that there is no evidence that he suffered "unusual" stress caused by the actual work he performed. The ALJ's Conclusions as set forth above do not conclude that his stress was caused by work but instead concludes only that Auck worked with stress caused by Auck's working with long-term chronic pain. This does not meet the statutory requirement that the employment itself caused the stress, but instead indicates only that Auck experienced pain while he worked which became stressful to him. There is no explanation or differentiation of whether that pain came from his non-work stress and his non-work injuries as opposed to the actual job he performed. Simply being stressed by going to work is insufficient to create a compensable work injury. To hold otherwise would open a Pandora's box whereby anyone who disliked their job and became stressed simply by walking into the workplace would be entitled to workers compensation benefits.

Clearly, the legislature did not intend that result. Rather, it heightened the burden of proof required in establishing a heart attack as a compensable injury when it amended

the statute in 1977 to require that stress be "unusual" and defined unusual as set forth above. This court has recognized that heightened standard. See e.g., Grace v. North Dakota Workman's Compensation Bureau, 395 N.W.2d 576, 580 (N.D. 1986) (discussing legislative amendment in affirmation of denial of a claim for benefits alleged from a heart attack); Schmalz v. North Dakota Workers Compensation Bureau, 449 N.W.2d 817, 820-21 (N.D. 1989) (discussing legislative history in decision affirming denial of benefits for claimed heart attack due to alleged inhalation of nitrogen dioxide and carbon monoxide). Appellee did not prove that Auck suffered "unusual" stress greater than the highest level of stress normally experienced or anticipated in the work of an assembler at Bobcat.

The distinction in the analysis derives from the basic principle of workers compensation that an injury "arises out of and in the course of hazardous employment." The Court in Kary v. North Dakota Workmen's Compensation Bureau, 67 N.D. 334, 272 N.W. 340 (1934), defined when an injury "arises out of and in the course of hazardous employment" as follows:

> Arising in the course of employment has a reference to the time of service, the hours of employment; "arising out of employment" is determined by the relation to the master's business in which the employee works; while "arising out of and in the course of employment requires a combination of both.
>
> ****
>
> An injury arises out of an employment when it occurs in the course of the employment and is the result of a risk involved in the employment or incident to it, or conditions under which it is required to be performed. ***The injury is thus a natural or necessary consequence or incident of the employment or the conditions under which it is carried on.*** Sometimes the employment will be found to directly cause the injury, but more often it arises out of the conditions incident to the employment.

Id. at 272 N.W. 340, 341-42 (internal citations omitted) (emphasis added).

To be a compensable injury Auck's stress must have arisen as a natural or necessary consequence of Auck's employment or the conditions of his employment. This precludes recovery that does not have a direct relationship to Bobcat. Any stress that Auck suffered must flow as a natural consequence of his work. Stress induced by pain does not flow as a natural or necessary consequence of Auck's position as an assembler.

"Unusual stress" includes stress triggered by demanding work beyond a reasonable person's physical or mental capabilities. In Ganske v. North Dakota Workmen's Compensation Bureau, 355 N.W.2d 800 (N.D. 1984), the claimant had been working the same position performing ordinary and normal duties, but on the particular day in question was feeling more rushed and stressed. The Court held that did not rise to the statutory definition of "unusual stress." Id. Similarly, when a former cook suffered heart disease that required surgery the Court stated the employer's work must impose such an exceptional strain on the worker that the worker's heart is affected and damaged. Kroh v. North Dakota Workers' Compensation Bureau, 425 N.W.2d 890 (N.D. 1988). In Kroh, the Court concluded stress brought on by being required to both cook and unload supplies was insufficient to be "unusually stressed." Id. The Court also recognized stress associated with financial difficulties was not "unusual stress" where a business ceased to be profitable during a recession. Christianson v. North Dakota Workers' Compensation Bureau, 470 N.W.2d 613 (N.D. 1991). If the facts in each of those cases did not meet the "unusual" stress required, then Auck's dread of work, reported by Dr. Smith, but never apparent to his co-workers is even less "unusual" stress.

Auck's stress was personal and was not caused by his work duties at Bobcat. The ALJ concluded that Dr. Smith's characterization (although based only upon Dr. Smith's "feeling") of Auck's stress as "extraordinary" was "unusual" stress greater than the highest level of stress normally experienced in the course of work as an assembler. (App. 120, RA62, p. W02118, ¶14.) Simply describing stress as "extraordinary" does not meet the definition of "unusual stress" as the ALJ suggests. Use of the term "extraordinary" correlates to a quantity or an amount of stress, but that only meets half of the definition the legislature assigned to the term. The second part of the test required Appellee to present evidence of what usual stress other Bobcat assemblers experienced and how Auck's work caused "unusual" stress which other assemblers did not experience. She provided no evidence of the "ususal" stress and no evidence of how Auck's work was any different to cause him any greater stress. Nor did the ALJ make specific Findings relating to base level of stress experienced by other Bobcat assemblers.

Stress that is personal, no matter how great, is not a compensable work injury because it does not meet the definition of "unusual stress" under the statute. As it stands, the ALJ's order has no limits: an individual who experiences stress and has a heart attack at work could receive compensation regardless of origins of the stress, so long as the stress is "greater than the highest level of stress normally experienced" by a worker. That standard bears no relationship to the employment. Thus, an employee could conceivably have a compensable claim if he was stressed by his own lack of income, vacation, benefits, family problems, political climate, or from pain caused by an ulcer. Most employees in high stress jobs, such as lawyers and air traffic controllers, who suffer heart attacks could make such claims. Such an application is not in accordance with the law.

Rather the cause of the unusual stress must be specifically rooted in the employee's work. The North Dakota Supreme court in the heart attack cases cited above declined to make such a broad application as ordered by the ALJ in this case. Auck's light duty work as an assembler did not cause "unusual" stress greater than experienced by any other employee in that position. This is particularly true where Auck suffered many contributing risk factors for heart attack.

The statute specifically requires that the unusual stress be greater than fifty percent the cause of the heart attack as compared to all other contributing factors combined. Dr. Smith did not even consider those other risk factors in Auck's heart attack but rather simply dismissed them as "irrelevant". He provided no explanation why those other risk factors were not contributing causes of Auck's death. He provided no explanation of how the prior cardiac incidents, occurring during the time periods when Auck was performing heavy duty assembly work could specifically be documented by him as not work related, yet this incident after Auck had been working light duty for several years could be caused by work.

Like Dr. Smith, the ALJ ignored and provided no explanation why those significant risk factors were not considered or how they did not contribute to the cause of Auck's heart attack. That is impermissible disregard of the evidence. Thus, the order is not in conformance with the law. The ALJ's order should be reversed, reinstating the original denial of WSI benefits.

II. THE ADMINSTRATIVE LAW JUDGE'S FINDINGS OF FACT AND SUBSEQUENT CONCLUSIONS OF LAW ARE NOT SUPPORTED BY THE PREPONDERANCE OF THE EVIDENCE.

The Court exercises restraint in deciding whether WSI's findings of fact are supported by a preponderance of the evidence. Fettig v. Workforce Safety & Ins., 2007 ND 23, ¶ 10, 728 N.W.2d 301. The court determines only whether a reasoning mind could have reasonably determined that the findings were proven by the weight of the evidence." Swenson v. Workforce Safety & Ins., 2007 ND 149, ¶ 22, 738 N.W.2d 892 (2007).

A claimant has the burden of proving by the preponderance of the evidence the injury is a compensable injury and is entitled to WSI benefits. Id. at ¶ 24. To carry the burden, the claimant must prove by a preponderance of the evidence the medical condition for which the claimant seeks benefits for is causally related to a work injury. Id. "To establish a causal connection, a claimant must demonstrate that his employment was a substantial contributing factor to the injury..." Id.

The ALJ specifically made three Findings that were paramount to his reversal of WSI's original denial benefits. These Findings which are not supported by the preponderance of the evidence include: (A) that Auck suffered from "unusual stress", defined as stress that was greater than the highest level of stress normally experienced or anticipated in Auck's line of work; (B) that long term chronic stress can be at least fifty percent the cause of a heart attack; (C) that Auck's stress was caused by having to work with long-term chronic pain.

A. The ALJ's Findings of Fact that Auck suffered stress greater than the highest level of stress normally experienced or anticipated in his line of work is not supported by the preponderance of the evidence.

To receive compensation Appellee bears the burden to prove by a preponderance of the evidence that Auck suffered stress greater than the highest level of stress normally experienced or anticipated as an assembler at Bobcat. N.D.C.C. § 65-01-02(10)(a)(3). This required Appellee to put forth evidence regarding the stress which employees in Auck's line work suffer. Because she did not furnish the court this evidence, she failed to meet her burden of proof.

The record reflects no evidence that Auck suffered stress greater than the highest level of stress normally anticipated for any assembler position in which he worked at Bobcat. The ALJ specifically found Auck was frustrated and upset with production quotas but "there is no evidence that any stress he experienced related to production quotas was more than what may be normally experienced or anticipated by Bobcat production workers..." The ALJ further found "there is no medical evidence of record showing that any stress [Auck] experienced as a result of Bobcat Company's quality control practices." In reference to Bobcat's strike, the ALJ found "there is no evidence showing that the nature and extent of the stress Auck experienced or anticipated relative to the strike was more than what may be normally experienced or anticipated..."

The ALJ relied on Dr. Smith's testimony that Auck "would walk into work, and the minute he would walk in the door he would start to feel anxious and stressed from work." However, Dr. Smith's notes clearly document Auck's reports to him with a few months of his death that he suffered from a lot of stress at home.

Again, Dr. Smith's testimony alone does not quantify Auck's stress in relation to the stress of his fellow assemblers. The statute requires "unusual stress" to be greater than the highest level of stress normally experienced or anticipated as an assembler. Dr. Smith's testimony is a conclusion that lacks supporting evidence. Without evidence of the level of stress experienced by other assemblers in the positions worked by Auck, it is impossible to know if Auck's stress was higher than the highest level of stress one would anticipate or experience as an assembler. Consequently, reasoning minds could not reasonably determine that the Findings are supported by a preponderance of the evidence.

B. The ALJ's Finding of Fact that long-term chronic pain can cause a heart attack is not supported by the preponderance of the evidence.

Workers compensation cannot be awarded based on surmise, conjecture, or a mere guess. See Wherry v. North Dakota State Hospital, 498 N.W.2d 136, 141 (N.D. 1993). Dr. Smith opined that chronic stress is a significant risk to a heart attack, and in support of those opinions, he cited to numerous references which were not admitted into evidence. However, it is troubling that, despite citing them as supportive of his opinion, Dr. Smith could not recall the conclusions of the articles. Upon cross-examination, he was asked if the references concluded that there was only limited and inconclusive empirical data to support the theory, and Dr. Smith indicated that he could not without reading the articles in full. Reasoning minds would reasonably find that a physician who had relied upon references as supportive of his opinions would know the conclusions of those references.

Dr. Smith asserted that medical references "extremely clearly" find that there is a relationship between stress and pain and depression and heart problems. Simply having a relationship is a far cry from supporting that chronic pain and chronic stress somehow

cause a heart attack. Dr. Smith then leaped to the conclusion that long-term chronic stress could be at least fifty percent the cause of Auck's heart attack, and dismissed as irrelevant all the known, objective risk factors with which Auck was diagnosed. Dr. Smith's testimony regarding the relationship between long-term chronic stress is nothing more than surmise, conjecture, and a mere guess. Even assuming that a correlation may exist between coronary heart disease and long-term chronic stress, that does not prove by the preponderance of the evidence that chronic stress caused Auck's heart attack, particularly with his prior cardiac incidents which Dr. Smith documented as non-work related and his many known cardiac risk factors, all of which are objective medical evidence. Reasoning minds could not reasonably find that "unusual" stress from Auck's work as a Bobcat assembler, caused Auck's heart attack or that any such "unusual" stress was at least fifty percent of the cause as compared to all other contributing causes combined.

C. The ALJ's Finding of Fact that Auck's stress was caused by having to work with long term chronic pain is not supported by the preponderance of the evidence.

Records cited above document Auck's complaints of stress at home. Even two and a half months prior to Auck's death, Dr. Smith noted Auck was still suffering from "lots of stress at home". (App. 26, RA W21, p. W00248.) The ALJ's own Findings recognized this documentation of "lots of stress at home." (App. 87, RA 62, Finding # 14, p. W02085). The ALJ's Findings also recognize that Auck suffered stress related to problems with a child. (App. 88, RA 62, Finding # 16, p. W02086). Nonetheless, despite no evidence that Auck experienced any work-caused "unusual stress" greater than any other assembler, and this evidence of non-work stress, the ALJ concluded that Auck's

stress resulted from working with long-term chronic pain. Because the ALJ did not explain his disregard for his own Findings, no reasoning person could reasonably find that the Findings and Conclusions were proved by the weight of the evidence from the entire record as required under Swenson, 2007 ND 149, ¶ 22, 738 N.W.2d 892. Accordingly, the Judgment affirming the ALJ's decision should be reversed and the original denial by WSI should be reinstated.

III. THE ADMINSTRATIVE LAW JUDGE'S CONCLUSIONS OF LAW ARE NOT SUSTAINED BY THE FINDINGS OF FACT.

The Supreme Court's review of administrative agency decisions is governed by N.D.C.C. §28-32-46, which requires a three step process to determine: (1) if the findings of fact are supported by the preponderance of evidence; (2) if the conclusions of law are sustained by the findings of fact; and (3) if the agency decision is supported by the conclusions of law. See Darnell v. North Dakota Workers Comp. Bureau, 450 N.W.2d 721 (N.D. 1990).

"While the Bureau has discretion to weigh the evidence before it, this Court has previously stated 'discretion is not freedom to pick and choose in an unreasonable manner.'" Flink v. North Dakota Workers Compensation Bureau, 1998 ND 11, ¶ 13, 574 N.W.2d 784 (N.D. 1998) (quoting Weber v. North Dakota Workmen's Compensation Bureau, 377 N.W.2d 571, 572 (N.D. 1985)). In Flink, the Court was critical of the ALJ, stating "[i]t appears the ALJ merely picked a date from the mass of medical records without explaining contrary medical records, or he overlooked evidence to the contrary." Id. at ¶ 13. Failure to explain contrary evidence led the Flink court to determine the decision was not supported by a preponderance of the evidence. Id.

Here, the Conclusions by the ALJ regarding the origins of Auck's stress are inconsistent, and are impermissible "picking and choosing" of evidence. In the Conclusions, the ALJ stated, "the likely cause of Auck's death on November 29, 2006, was a heart attack caused by stress resulting from his work with long-term chronic pain..." The ALJ's Conclusion is irreconcilable with and is not supported by his own Findings.

On September 5, 2006, just two and a half months prior to his death, Auck saw Dr. Smith and admitted there was "still lots of stress at home" and did not "feel like he is good enough, where he can necessarily stop the Prozac." (App. 87, RA 62, Finding # 14, p. W02085). Later, the ALJ found that Dr. Smith noted some of his stress resulted from problems with a child at home. (App. 88, RA 62, Finding # 16, p. W02086). Finally, the ALJ noted that Dr. Smith found the greater part of Auck's stress resulted from his long chronic pain and his work. (App. 120, RA 62, Conclusion # 13, p. W02118).

This case presents the same problem which was present in Flink, supra. The ALJ specifically found Auck suffered stress from multiple sources in his Findings, but then in his Conclusions the ALJ selected one of Auck's stressors and altogether dismissed the other stressors which had been documented by Dr. Smith and identified by Auck himself. A reasonable mind cannot discern from the ALJ's Findings and conclusions an explanation for that disregard. Consequently, a reasonable minded person would find that the ALJ impermissibly "picked and chose" evidence from the record in an unreasonable manner, requiring a reversal of the Judgment affirming the ALJ's decision and a reinstatement of WSI's original denial of Workers Compensation benefits.

IV. THE ALJ ABUSED HIS DISCRETION WHEN WEIGHING THE CREDIBILITY OF THE CONFLICTING EXPERT MEDICAL OPINIONS.

An ALJ in a Workers Compensation case must weigh the credibility of medical evidence and resolve conflicting medical opinions. Swenson, 2007 ND 149, ¶ 26. When confronted with a "battle of the experts," a fact finder may rely on either party's expert witness. Id., citing Elshaug v. Workforce Safety & Ins., 2003 ND 177, ¶11, 671 N.W.2d 784 (2003). Although the fact finder may resolve conflicts between medical opinions, he is not permitted to pick and choose in an unreasonable manner. Rather, the entire record must be considered, all the evidence must be sufficiently addressed, and the fact finder must adequately explain its reasons for disregarding evidence presented. Id.

Here, the ALJ went out of his way to make credibility findings in favor of Dr. Smith. The ALJ specifically noted that Dr. Smith's opinions seemed to evolve through the course of the proceedings such that it raised a suspicion of advocacy rather than an objective view of the medical evidence. The ALJ also noted Dr. Smith's bias acknowledged by Dr Smith himself wherein Dr. Smith agreed that had had "a very low opinion of the Bobcat Company," which opinion was predicated on the false assumption that Bobcat had failed to accommodate Auck's work restrictions. Dr. Smith also did not know that for at least three years prior to his death Auck had worked in light duty, not a heavy duty position. Yet, despite that bias and lack of basis in fact, the ALJ still found Dr. Smith more credible. He justified this by referencing Siewert v. North Dakota Workers Compensation Bureau, 2000 ND 33, ¶ 25, 606 N.W.2d 501 (2000). Siewert held that a "long-term doctor-patient relationship may afford the treating doctor a more comprehensive view of the claimant's medical history and condition." Id.

Siewert does not find that a long-term treating physician is automatically more credible than other medical experts. Rather, Siewert only states the long-term treating physician may have more knowledge of the claimant's medical history and condition. It does not suggest an ALJ should find a treating physician more credible when the ALJ specifically notes the physician acted as an advocate rather than providing an objective medical opinion. Nor does Siewert hold that a treating physician is more credible when he admits to having a biased "very low opinion" of an employer which opinion is based on incorrect suppositions on the part of the physician. Nor does Siewart hold that a treating physician is more credible when he renders an opinion about the effect of the work place on the employee when he is unaware of the actual work duties in which the employee engaged for at least three years. Under such circumstances the treating physician's opinion lacks credibility.

The ALJ did not make any Findings, nor was there any evidence that either Dr. Berman or Dr. Blanchard changed their opinions, contrary to Dr. Smith's evolving opinion. In contrast to evidence and Findings of the lack of knowledge of Dr. Smith with respect to Auck's work duties and his unfounded belief that Bobcat failed to accommodate Auck, the ALJ did not make any Findings, nor was there any evidence, that either Dr. Berman or Dr. Blanchard rendered any opinion that was not based on the facts in the record. Instead, they were consistent in testifying that, based upon their education, training, and experience, they were unaware of medical evidence that long-term chronic pan and stress could cause a heart attack such as that experienced by Auck. Dr. Blanchard simply stated that to his knowledge cumulative stress is "not scientifically yet established" as a cause for cardiac arrest and Dr. Berman testified it was controversial.

Even Dr. Smith did not identify any medical literature that determined that chronic stress, in the presence of all the risk factors such as experienced by Auck, was a greater contributing cause of heart attacks than those risk factors combined.

The ALJ was critical that neither Dr. Berman nor Dr. Blanchard offer any "rationale for their respective dismissal of the effect of years of chronic, debilitating pain which Auck experienced in the course of his work..." In contrast, interestingly, the ALJ did not explain Dr. Smith's blithe dismissal of the known coronary risk factors with which Auck was diagnosed. Doctors are called as medical experts for their ***objective*** medical opinions not their mere supposition or guess work. Thus, to testify other than they did would have required Dr. Berman and Dr. Blanchard to simply guess or speculate.

Appellee bore the burden of proof to establish that Auck's heart attack was caused by his employment as an assembler at Bobcat with reasonable medical certainty and that "unusual stress" resulted from long-term chronic pain from work which was fifty percent the cause of a heart attack in light of all contributing factors combined. Dr. Smith did not explain how those many other risk factors could be irrelevant in causing Auck's heart attack. The ALJ did not explain how those other risk factors could be irrelevant in causing Auck's heart attack. Again, Appellee bears the burden of proof by a preponderance of the evidence. WSI does not have the burden of proving an injury is not compensable. Here, Appellee did not prove by a preponderance of the evidence that Auck suffered from a compensable injury. The ALJ's Findings and Conclusions regarding expert credibility in effect impermissibly shifted the burden of proof onto WSI.

Finally, in his Conclusion, # 15, the ALJ criticized Dr. Blanchard's testimony that it was his "gut feeling" that the cause of Auck's heart attack was a pulmonary embolus. In contrast, the ALJ held Dr. Smith to a different standard, accepting Dr. Smith's "feeling" that Auck's stress was extraordinary. (App. 135, 1-22-08 TR., Dr. Smith, RA 65, p. 28, ll. 7-8; App. 88, Finding # 15, RA 62, p. W02086).

A physician's medical opinion may be based in part upon his education and experience. Swenson at ¶ 29. Dr. Blanchard's "gut feeling" was formed after his review of Auck's medical records, his having viewed the Bobcat work environment, and on his education, training and experience as an emergency and occupational health physician. In addition, Dr. Blanchard's opinion was corroborated by the records of Dr. Blake, one of the physicians who attended Auck at the hospital. Bobcat's nurse, Wendy McNichols, based upon her experience as a cardiac nurse, also raised concerns about a blood clot in light of Auck's complaints of leg pain. Thus, Dr. Blanchard's testimony regarding his "gut feeling" was corroborated by other evidence and testimony. The ALJ as fact finder must "consider the entire record, sufficiently address the evidence and ***adequately explain*** his reasons for disregarding the evidence presented." Swenson, 2007 ND 149, ¶ 26 (emphasis added). It is "insufficient for the ALJ to merely provide any reason for disregarding competent medical testimony about causation. He must sufficiently address the reason for doing so which reason must be supported by the record and must comply with the prevailing law. Id. at ¶ 28. The ALJ did not adequately explain why he disregarded the testimony of Drs. Berman and Blanchard and instead accepted Dr. Smith's testimony which was based on an incorrect understanding of the work performed by Auck and Bobcat's accommodation of Auck's restrictions and which dismissed as

irrelevant substantial objective medical evidence that Auck suffered from multiple cardiac risk factors. A reasonable mind cannot reasonably find that the Findings are supported by a preponderance of the evidence or that they sufficiently address all the evidence presented. Nor can a reasonable person reasonably find that the Conclusions are supported by the Findings. Rather, they are not in accordance with the law found at N.D.C.C. 65-01-02(10)(a)(3) and the Judgment affirming the Findings and Conclusions should be reversed and WSI's original denial of Workers Compensation benefits should be reinstated.

CONCLUSION

Based on the foregoing facts, law and argument, WSI respectfully requests that the ALJ's decision be reversed and order that WSI's initial denial of workers' compensation benefits be reinstated because reasonable minds cannot reasonably find that the ALJ's order is in accordance with the law, that Appellee proved that Auck's heart attack was caused, to a reasonable degree of medical certainty, by unusual stress from his employment as a Bobcat assembler which stress was at least fifty percent or greater the cause of the heart attack considering all other contributing causes combined, or that the Conclusions are supported by a preponderance of the evidence.

Respectfully submitted this 11 day of September, 2009.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Appellant's Brief is in compliance with 32(5)(A) and 32(7)(A) of the North Dakota Rules of Appellate Procedure.

Lolita G. Romanick

STATE OF NORTH DAKOTA)
) ss
COUNTY OF GRAND FORKS)

AFFIDAVIT OF SERVICE
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Supreme Court No: 20060195
District Court No: 08-09-C-00302
Claim No.: 2001 646982 T
OAH File No: 20070350

The undersigned, being first duly sworn, deposes and states that a copy of:

Brief and Appendix of Appellant Workforce Safety & Insurance

was served on September 11, 2009, by placing a true and correct copy thereof in an envelope addressed as follows, to-wit:

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and depositing the same with prepaid postage in the United States mail at Grand Forks, North Dakota.

To the best of affiant's knowledge, the address above given is the actual post office address of the party intended to be so served.

Pam Wohlers

SUBSCRIBED AND SWORN to before me this 11 day of September, 2009.

Vickie Mahnke

Vickie Mahnke, Notary Public
My Commission Expires: 4-30-12

VICKIE MAHNKE
Notary Public
State of North Dakota
My Commission Expires April 30, 2012